IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0401
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
JOSE ANGEL VALDEZ,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20053608

Honorable Stephen C. Villarreal, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Jose Valdez was convicted after a jury trial of one count of sexual conduct with a minor under the age of fifteen and two counts of child molestation, all class two felonies and dangerous crimes against children.[1] The trial court sentenced him on the first count to a mandatory prison term of life without parole eligibility for thirty-five years, to be followed consecutively by two mitigated, concurrent, ten-year prison terms on the other two counts. On appeal, Valdez contends the trial court erred in sentencing him under A.R.S. § 13-604.01(A) and claims the sentence constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution. For the following reasons, we affirm.

¶2 We view all facts in the light most favorable to sustaining the conviction. *State v. Wassenaar*, 215 Ariz. 565, ¶ 2, 161 P.3d 608, 612 (App. 2007). In early July 2005, an eleven-year-old boy, L., and his mother, G., were visiting friends in Tucson while on vacation from their home in Ensenada, Mexico. One day during their stay, their host invited a few people over, including Valdez and his wife and two children. G. had met Valdez once before during a previous visit to Tucson. G.'s mother, who was also present, knew Valdez as well.

¶3 After a couple of hours, Valdez announced he and his family were leaving to go bowling and get some pizza. Shortly after they had walked out the door, Valdez returned

[1]On the sexual conduct charge, the jury also found beyond a reasonable doubt that the victim was under twelve years of age.

and asked G. if L. could join them so Valdez's young son would have some company. G. hesitated, but L. wanted to go, and G.'s mother said Valdez was "a reliable type." G. ultimately permitted L. to go with Valdez.

¶4 Valdez first took his family and L. home "to pick up some money." There, Valdez asked L. if he wanted to go to the store with him, and L. agreed. On the way, Valdez asked L. if he knew what a "sexologist" was. L. said he did not. Valdez told L. that he was a doctor and that he had had a fifteen-year-old patient in Mexico who had died from tumors in his testicles.

¶5 Believing Valdez was a doctor, L. gave him permission to "touch [his] testicles to see if [he] had any such tumor." Valdez reached under L.'s clothing and for five to seven seconds felt L.'s testicles, after which he told L. he did have a small tumor. Valdez and L. then returned to Valdez's house and picked up his wife and children to go bowling and get pizza. At the pizza parlor, Valdez told L. he could remove the tumor by "sucking on [L.'s] penis" until he ejaculated. L. did not know what an ejaculation was and told Valdez he was not sure if he wanted Valdez to "remove the tumor."

¶6 After leaving the pizza parlor, L. called his mother to ask if he could go back to Valdez's house and watch some movies. She gave him permission to watch one. During the movie, when no one else was watching, Valdez touched L.'s testicles over his clothing and told L. that "it would be big later on." Then, as Valdez was driving L. back to where he and his mother were staying, Valdez again asked L. if he wanted the tumor removed.

Valdez showed L. "his identification that said he was a doctor," which L. took to be valid even though he did not understand the English words on the identification. L. agreed to let Valdez remove the tumor.

¶7 Valdez found a dark place behind a building to park his van and told L. they needed to be where no one could see them because someone might think he was a "satyr," a word that L. did not understand. Valdez then told L. to take down his pants, stand on top of the rear bumper of the van, and watch for anyone coming. Valdez then engaged in oral contact with L.'s penis for seven to ten minutes, afterwards asking L. to keep what had happened "man to man." L. did not tell his mother about the incident until after they had returned to Ensenada. The next week, L. and his mother returned to Tucson to file a report with the Tucson Police Department.

¶8 Valdez argues the trial court erred in imposing a life sentence under § 13-604.01(A) for his sexual conduct conviction. At sentencing, the trial court said:

> I've come to the conclusion that I don't have any discretion under 13-604.01(A) and that I must impose the prison term of 35 years to life. I think the record should also be absolutely clear that I'm imposing this sentence, again, because I don't believe that I have any discretion and if I had discretion that I would certainly consider and feel more comfortable imposing a much lesser sentence than that.

Valdez argues the trial court had discretion to sentence him under § 13-604.01(B) instead of § 13-604.01(A) because subsection A excepts masturbatory contact from its application, and the sexual conduct here might be considered masturbatory.

¶9 Valdez acknowledges that our recent decision in *State v. Hollenback*, 212 Ariz. 12, 126 P.3d 159 (App. 2005), is directly on point in this case and runs contrary to his argument, but he nevertheless asks that we reconsider our decision in *Hollenback*. A previous decision by this court is "highly persuasive and binding" upon us, "unless we are convinced that the prior decision is clearly erroneous or conditions have changed so as to render the prior decision inapplicable." *State v. Dungan*, 149 Ariz. 357, 361, 718 P.2d 1010, 1014 (App. 1985). Valdez argues *Hollenback* is in conflict with the rule of lenity as set forth in *State v. Flores*, 160 Ariz. 235, 772 P.2d 589 (App. 1989), which he says requires any doubt about which section of the statute applies to be resolved in his favor.

¶10 In *Flores*, this court interpreted the public sexual indecency statute, A.R.S. § 13-1403(A)(3), stating, "Where a statute is susceptible to more than one interpretation, the rule of lenity dictates any doubt should be resolved in favor of the defendant." 160 Ariz. at 240, 772 P.2d at 594. After finding the term "sexual intercourse" to be ambiguous, the court concluded that a defendant could not be convicted of committing an act of "sexual intercourse" in the presence of others when the conduct in question was "one person acting alone through manual masturbatory contact." 160 Ariz. at 239, 240, 772 P.2d at 593, 594.

¶11 We do not find that *Hollenback* conflicts with *Flores*. The ambiguity that existed in *Flores* is not the same ambiguity that Valdez is asserting here. In *Flores*, the question before the court was whether one person's masturbatory contact with only himself constituted "sexual intercourse" under § 13-1401(3). 160 Ariz. at 238, 772 P.2d at 592.

Here, Valdez alleges the exception for masturbatory contact in § 13-604.01 should include oral sexual contact between two people. The court in *Hollenback* rejected this very argument. 212 Ariz. 12, ¶ 18, 126 P.3d at 164. We did not find § 13-604.01(A) ambiguous then, nor do we find it so now. Consequently, the rule of lenity is not applicable. *See id.*

¶12 This court appropriately analyzed the statutes of concern in *Hollenback* as follows:

> Section 13-604.01(A) applies to an adult defendant convicted of sexual conduct with a minor twelve years of age or younger, but it excludes from its scope masturbatory contact. Section 13-1405(A) defines sexual conduct as "sexual intercourse or oral sexual contact" with the minor. Section 13-1401 defines sexual intercourse as: "penetration into the penis, vulva or anus by any part of the body or by any object or masturbatory contact with the penis or vulva." It also defines oral sexual contact as: "oral contact with the penis, vulva or anus," without mentioning masturbatory contact. We conclude therefore that the legislature intended the exception for masturbatory contact in § 13-604.01 to refer to the definition of sexual intercourse, which contains a reference to masturbatory contact, rather than the definition of oral sexual contact, which contains no such reference. In this case, the evidence showed that Hollenback had performed oral sex on Z. That act was plainly within the definition of oral sexual contact in § 13-1401(1), and thus, is included in § 13-1405(A) as a basis for a conviction of sexual conduct with a minor.

Id. Based on this analysis, we concluded, "Hollenback was convicted of sexual conduct with a minor less than twelve years old based on oral sexual contact, [thus] the life sentence mandated by § 13-604.01(A) was properly imposed." *Id.*

¶13 We cannot find clear error in our previous analysis.[2] It conforms to long-standing principles of statutory construction. *See State v. Roscoe*, 185 Ariz. 68, 71, 912 P.2d 1297, 1300 (1996) ("'A well established rule of statutory construction provides that the expression of one or more items of a class indicates an intent to exclude all items of the same class which are not expressed.'"), *quoting Pima County v. Heinfeld*, 134 Ariz. 133, 134, 654 P.2d 281, 282 (1982); *State v. Wagstaff*, 164 Ariz. 485, 490, 794 P.2d 118, 123 (1990) ("Clear and unambiguous statutory language is given its plain meaning unless impossible or absurd consequences would result."); *State v. Fell*, 203 Ariz. 186, ¶ 6, 52 P.3d 218, 220 (App. 2002) ("In construing a statute, our primary goal is to discern and give effect to the legislature's intent."). And, because the trial court in *Hollenback* had sentenced the defendant to life imprisonment under § 13-604.01(A) for oral sexual contact with a minor younger than twelve, 212 Ariz. 12, ¶ 18, 126 P.3d at 164, that case applies directly to the case before us now. Because we agree with this court's previous reasoning in *Hollenback* and because the issue presented there is indistinguishable from the issue here, we conclude for the reasons set forth in *Hollenback* that the trial court did not err in sentencing Valdez pursuant to § 13-604.01(A).[3]

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[2]Valdez has not argued that "conditions have changed so as to render the prior decision inapplicable." *State v. Dungan*, 149 Ariz. 357, 361, 718 P.2d 1010, 1014 (App. 1985).

[3]Valdez also argues he should not be sentenced under § 13-604.01(A) for his conviction for sexual conduct with a minor because other, seemingly more egregious crimes like second- degree murder and continuous sexual abuse are sentenced under § 13-604.01(B). But the authority for determining appropriate sentences for crimes committed

¶14 Valdez also argues his life sentence without possibility of parole for at least thirty-five years for a single incident of manual and oral sexual contact with a child constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution and its counterpart, article II, § 15 of the Arizona Constitution.[4] The trial court noted the prison term is "extremely harsh" but did not find it rose to the level of being "grossly disproportionate to the offense."

¶15 The Eighth Amendment prohibits sentences that are """grossly disproportionate""" to a crime. *Ewing v. California*, 538 U.S. 11, 23, 123 S. Ct. 1179, 1187 (2003), *quoting Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680, 2705 (1991) (Kennedy, J., concurring), *quoting Solem v. Helm*, 463 U.S. 277, 288, 103 S. Ct. 3001, 3008 (1983); *see also State v. Berger*, 212 Ariz. 473, ¶ 10, 134 P.3d 378, 380 (2006). An inference of gross disproportionality arises when the harshness of the penalty outweighs the gravity of the offense. *Berger*, 212 Ariz. 473, ¶ 12, 134 P.3d at 381. In

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lies with the legislature. *State v. Lopez*, 174 Ariz. 131, 142, 847 P.2d 1078, 1089 (1992); *State v. Wagstaff*, 164 Ariz. 485, 490, 794 P.2d 118, 123 (1990). The judiciary should not invade the legislature's province "'unless a statute prescribes a penalty "out of all proportion to the offense."'" *State v. Mulalley*, 127 Ariz. 92, 97, 618 P.2d 586, 591 (1980), *overruled on other grounds by State v. Noble*, 152 Ariz. 284, 731 P.2d 1228 (1987), *quoting In re Lynch*, 503 P.2d 921, 930 (Cal. 1972). That is not the case here, as we address later in this decision.

[4]Valdez has not specifically argued that Arizona's prohibition of cruel and unusual punishment has any different meaning or scope than the identically phrased prohibition set forth in the Eighth Amendment. We therefore need not address Arizona's constitutional provision separately.

conducting that inquiry, we "must first determine whether the legislature 'has a reasonable basis for believing that [a sentencing scheme] "advance[s] the goals of [its] criminal justice system in any substantial way."'" *Id.* ¶ 17, *quoting Ewing*, 538 U.S. at 28, 123 S. Ct. at 1189, *quoting Solem*, 463 U.S. at 297 n.22, 103 S. Ct. at 3013 n.22 (first alteration in *Berger*; second and third alterations in *Ewing*). If a sentence "arguably furthers the State's penological goals and thus reflects 'a rational legislative judgment, entitled to deference,'" it is not grossly disproportionate to the crime. *Berger*, 212 Ariz. 473, ¶ 17, 134 P.3d at 382, *quoting Ewing*, 538 U.S. at 30, 123 S. Ct. at 1190. "[A] sentencing scheme that does not violate the Eighth Amendment in its general application may still, in its application to 'the specific facts and circumstances' of a defendant's offense, result in an unconstitutionally disproportionate sentence" if the defendant's conduct falls outside the "core" prohibitions of the statute. *Id.* ¶¶ 39, 44, *quoting State v. Davis*, 206 Ariz. 377, ¶ 32, 79 P.3d 64, 71 (2003).[5]

¶16 The state contends Valdez has not shown an inference of gross disproportionality in this case, and we must agree. "Our legislature has determined that

[5]If, in the rare case, an inference of gross disproportionality does arise, then the court must compare the sentence to sentences for other crimes in this state and to sentences for the same crime in other states. *State v. Berger*, 212 Ariz. 473, ¶ 12, 134 P.3d 378, 381 (2006); *see also State v. Davis*, 206 Ariz. 377, ¶¶ 38, 43-46, 79 P.3d 64, 72, 73-74 (2003) (holding mandatory, flat-time sentence of fifty-two years for twenty-year-old male who had sex with two willing, post-pubescent, teenage girls grossly disproportionate to other crimes in Arizona and to sentences for same crime in other states). Because we do not find the threshold inference of gross disproportionality here, we need not conduct this part of the analysis.

those who commit sexual crimes against children are the most heinous of offenders." *State v. Crego*, 154 Ariz. 278, 280, 742 P.2d 289, 291 (App. 1987). In an attempt to deter such crimes, the Arizona legislature in 1985 passed the Dangerous Crimes Against Children Act, enacting severe punishments for crimes committed against children under the ages of fifteen and twelve. *See* § 13-604.01; 1985 Ariz. Sess. Laws, ch. 364, § 6. Our courts have repeatedly concluded the legislature had a reasonable basis for believing the penalties set forth in § 13-604.01 were reasonably calculated to advance the twin goals of punishing and deterring persons who pose a danger to children. *See Berger*, 212 Ariz. 473, ¶ 22, 134 P.3d at 383 ("This legislation provides 'lengthy periods of incarceration . . . intended to punish and deter' 'those predators who pose a direct and continuing threat to the children of Arizona.'"), *quoting State v. Williams*, 175 Ariz. 98, 102, 854 P.2d 131, 135 (1993) (alteration in *Berger*); *State v. Wagstaff*, 164 Ariz. 485, 490-91, 794 P.2d 118, 123-24 (1990) (lengthy prison terms and prohibitions on release for persons who commit dangerous crimes against children address goals of protecting children and punishing severely those who prey on them); *Boynton v. Anderson*, 205 Ariz. 45, ¶ 12, 66 P.3d 88, 91 (App. 2003) ("The Dangerous Crimes Against Children Act, as interpreted by our appellate courts, sets forth a clear, unmistakable, and resolute public policy intended to protect our children.").

¶17 Valdez maintains his sentence is grossly disproportionate to the crimes of which he was convicted because he is serving at minimum forty-five-year sentence for "twice touching the victim[']s genitals (one of the touchings was indirect, i.e. over his clothing) and

performing oral sex on the boy." But a sentence does not become disproportionately long "merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate."[6] *Berger*, 212 Ariz. 473, ¶ 28, 134 P.3d at 384. Instead, we must "'focus[] on the sentence imposed for each specific crime, not on the cumulative sentence.'" *Id.*, *quoting United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988).

¶18 Valdez was sentenced to a mandatory life sentence for performing oral sex on an eleven-year-old boy and to ten additional years for touching the boy's genitals. In committing these crimes, Valdez violated L.'s trust and the trust of L.'s family and engaged in extraordinarily premeditated, predatory, and manipulative behavior that exploited the boy's youthful naivete. The ultimate act for which Valdez was sentenced to life imprisonment was protracted—oral sex with L. for seven to ten minutes—and involved securing his victim's assistance by having the boy act as a lookout during the sex act.

¶19 Given those surrounding circumstances, we conclude that Valdez's conduct is at the core of the prohibitions of § 13-604.01—sexual predation and threatening the safety of a minor—and that his lengthy sentences "arguably further[] the State's penological goals

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[6]An exception to this general rule exists when a sentence "becomes unconstitutionally disproportionate to the crimes committed because the sentences are mandatorily lengthy, flat, and consecutive." *Davis*, 206 Ariz. 377, ¶ 47, 79 P.3d at 75. But *Davis* "represents an 'extremely rare case,'" and the dissimilar facts and circumstances of Valdez's offenses do not demand application of such an exception. *Berger*, 212 Ariz. 473, ¶ 38, n.3, 134 P.3d 378, 385, 384 n.3.

and thus reflect[] 'a rational legislative judgment, entitled to deference.'" *Berger*, 212 Ariz. 473, ¶ 17, 134 P.3d at 382, *quoting Ewing*, 538 U.S. at 30, 123 S. Ct. at 1190. We thus cannot infer gross disproportionality and, therefore, do not find Valdez's sentences constitute cruel and unusual punishment.

¶20 For the foregoing reasons, we affirm.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge